UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IOWA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, *et al.*,

Plaintiffs,

v. 17 Civ. 6221 (KPF)

BANK OF AMERICA CORPORATION, *et al.*,

Defendants. Remote Conference

March 3, 2022
2:10 p.m.

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

COHEN MILSTEIN SELLERS & TOLL PLLC
Attorneys for Plaintiffs
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BY: MICHAEL A. PASKIN, ESQ.

(Case called)

THE DEPUTY CLERK: Counsel, please state your name for the record, beginning with plaintiffs.

MR. EISENKRAFT: Michael Eisenkraft, Cohen Milstein Sellers & Toll, and with me is my colleague Rob Cobbs and my colleague from Quinn Emanuel, Sascha Rand, but I expect I'll be speaking today.

THE COURT: Okay. Mr. Eisenkraft, this is Judge Failla. I thank you very much. And I just heard my deputy and the phone system tell me that there were many, many people on this call. Since not everyone is speaking, I think I'll just focus on those who are, and I know that and welcome all of you.

And representing the defendants today, is it Mr. Wick?

MR. WICK: Correct, your Honor.

THE COURT: Thank you very much.

All right. I appreciate your willingness to participate in this conference on what seems like short notice. I really wanted to get back to you after receiving the initial submission from plaintiffs on February 23rd and the defendants' response on February 28th. I was on trial last week, and I'm just sort of recovering from that.

Mr. Eisenkraft, I'm going to begin by speaking with you, sir, and I'm going to also just note that I'd appreciate it if you would get a transcript of this conference, and if you order it in the ordinary course and receive a copy, I'll

receive a copy automatically. So would you be able to do that, sir?

MR. EISENKRAFT: Of course, your Honor.

THE COURT: I thank you.

All right. Mr. Eisenkraft, I guess what I'm trying to figure out in the first instance is a really basic thing, and you'll excuse me if you've said it very clearly in your submission and I overlooked it. That's the fog that comes from having trials. Sir, I'm trying to understand whether your concern is that JPMorgan has violated the discovery protocols or agreements that it entered into with you in this litigation or whether what you're saying is, as a result of what you've learned from the CFTC and SEC materials, you would have negotiated the discovery protocols in a different way.

MR. EISENKRAFT: The second, your Honor. And basically what we're trying to figure out here is just basically figuring out what happened. You know, we have a situation where there is admitted widespread illicit use of personal communications by JPMorgan employees and the destruction of those communications, and, I mean, this is an antitrust case, so those kind of illicit communications would be potentially really important to our case, and we're trying to figure out, were any of the custodians in our case implicated in this, and if so, when did JPMorgan find out, when did counsel find out, and those are the very basic questions

we're trying to find answers to. That's what we're here for today.

THE COURT: Okay. Pause. Thank you. And just pause right there, please, sir.

Do I understand that you personally are involved in the *Interest Rate Swaps* litigation as well?

MR. EISENKRAFT: Yes, your Honor.

THE COURT: When I've looked -- and please understand that I know basically what the parties have told me about that litigation. I'm not going to dive deeply into it. I have my own docket. But as I understood it, the discovery protocols into which you entered in this case admitted the possibility and indeed the fact that certain business was conducted by JPMorgan employees on their personal devices, and I thought that's why there was the inclusion of what I'll call the BYOD protocol. Is there something different? Because I would have thought that that would have covered the documents that you believe have been lost in this litigation.

MR. EISENKRAFT: There are some distinctions there, your Honor. So our protocol, which we negotiated thinking that perhaps, you know, here and there maybe a communication had been sent, we, you know, we assumed that in general, you know, as attorneys state and the policies state, they comply with regulations. But we were only allowed to negotiate with respect to BYOD devices, you know, devices that were paid for

or owned by JPMorgan. Personal devices were considered, you know -- JPMorgan would not produce anything from that, we would not ask about them, totally out of bounds, and said that there's nothing, you know -- we cannot go there, basically. So it's those kinds of devices, especially, that we're interested in now.

THE COURT: And what you're saying to me, sir, is the upshot of the CFTC and SEC orders is that when they're referring to employees conducting business on personal devices with the knowledge of JPMorgan management, these aren't the BYOD devices; these are purely personal devices as to which JPMorgan had no involvement in the billing or payment or retention of information from.

MR. EISENKRAFT: I mean, we have the same information you do from the orders, but I assume --

THE COURT: Yes, sir.

MR. EISENKRAFT: -- it's both personal, purely personal and BYOD, but I don't know. And that's what we're trying to figure out.

THE COURT: And was that part of -- please understand, I don't want to get into any privileged communications, and I also don't really want to get into the gory details of any meet-and-confers that you've had. But is it the case that your discussions with defense counsel lead you to believe that the BYOD protocol in your agreements does not extend to cover the

materials that were discussed or at issue in the SEC and CFTC orders?

MR. EISENKRAFT: Correct. I believe the BYOD may be a subset of those, but the larger thing leaves personal devices untouched. So, you know, it's, you know, if you have your cellphone, some people have two cellphones, some people have one cellphone, some people have, you know -- so it would be a subset.

THE COURT: Okay. Now other than the fact -- and this is a big "other than," but let me say this nonetheless. You have reason to believe that, wittingly or unwittingly, your adversaries have not retained or have not produced information contained on purely personal, not BYOD devices by JPMorgan employees; is that correct?

MR. EISENKRAFT: Large number of their employees. I don't know whether our custodians were in that large number, so potentially. That's what I'm trying to figure out, but yes.

THE COURT: Of course, sir. Of course. That's why I said, so other than that, you don't have reason to believe that JPMorgan otherwise violated the discovery protocols in this case, correct?

MR. EISENKRAFT: Correct.

THE COURT: Okay. And so your concern is, you'll be sad if it turns out that these custodians, the custodians listed, are part of the groups who did things on personal

devices they did not have, correct, that JPMorgan's lawyers did not have access to, correct?

MR. EISENKRAFT: Sad is an apt description, yes.

THE COURT: Okay. Thank you. One moment, please.

In your discussions, sir, in your meet-and-confers, did you receive any assurance or communications from defense counsel suggesting that the custodians at issue in your case were not involved or did not use totally personal devices?

MR. EISENKRAFT: I'm sorry. In our --

THE COURT: I'll ask a better question, sir. My understanding -- and I think you'd agree with me -- is that you had some conversations with JPMorgan's counsel before filing your letter of February 23rd, correct?

MR. EISENKRAFT: Yes, many conversations.

THE COURT: Okay. Fair enough, sir. And in those conversations, I assume you've explained to them the very thing that you're explaining to me, which is that you are concerned that their custodians may have used personal devices to conduct business or to communicate about matters at issue in this case and therefore you don't know whether the materials that you received were in fact the entire universe of materials, correct, sir?

MR. EISENKRAFT: I hope I was that clear, but that's certainly what I intended to convey, yes, so hopefully I did.

THE COURT: Okay. When you raised those issues with

defense counsel, did they say anything to the effect that these custodians were not involved in those other matters, though these custodians only used either company phones or company devices or the BYOD program and that you had nothing to fear?

MR. EISENKRAFT: No.

THE COURT: Okay. Was it instead just couched in terms of burden, sir?

MR. EISENKRAFT: It was basically that we forfeited our rights and would we be interested in asking about a subset of the custodians and, you know, we, you know -- time has expired and, you know, we don't have any documents, those kinds of -- but it was not -- and what I found a little frustrating, to be honest, is like, I looked at the SEC order, and they're required to hire a compliance consultant who will, like -- who will describe -- who will review the survey of how JPMorgan determined which employees failed to comply with JPMorgan policies and procedures, so I think they have a list, and I just want to know if our people are on that list.

THE COURT: Okay. Again, so that I'm clear, Mr. Eisenkraft, is it the case that it's not as though you would have asked for different or other custodians, you care about the custodians you named earlier?

MR. EISENKRAFT: Yes.

THE COURT: Thank you. Okay.

All right. Mr. Wick, let me begin with you, sir. Do

you want to just respond or add your thoughts to the discussion that I've had with Mr. Eisenkraft, or is it your preference instead, sir, that I ask you questions?

MR. WICK: I'd like to respond, if I may.

THE COURT: Please.

MR. WICK: So I would say a couple of things, your Honor.

First, the questions that Mr. Eisenkraft is now asking we think were asked and answered, to the extent they have any arguable relevance, in May 2019 when the plaintiffs initiated this question. So the parties agreed, pursuant to an elaborate agreement relating to phone communications and phone discovery, on a specific set of covered custodians for whom there would be certain phone discovery. The plaintiffs asked us in May 2019, have you taken appropriate steps to preserve the communications of those individuals; we responded telling them the three things we had done to preserve those communications and that we were doing to produce those communications. And what we said was, number one, we promptly sent, after the initiation of the litigation, a document hold notice that explicitly called on the covered custodians to preserve personal device communications; secondly, we told them that in light of their communications, we were going to go back to the covered custodians who were still employed at the bank and specifically remind them of their obligation to preserve those

communications; and third, we told them that to the extent that those individuals had any intercustodian communications that the plaintiff had expressed an interest in having produced, we would ask them to give those communications to us. And we tried to confirm, and I believe have confirmed to the plaintiff, that those things were done.

And so as to the covered custodians, we had communications with them about whether they used personal devices, whether there was anything to preserve, whether there was anything to produce, and in all instances but one, the result of those communications was there was nothing to preserve and nothing to produce. The one exception was that for one custodian, one JPMorgan custodian, there had been a string of text messages exchanged with a custodian at another bank, Goldman Sachs, and we timely produced that string of about 50 text messages in discovery. I will emphasize that string of 50-odd text messages has nothing at all to do with this litigation. It had nothing to do with stock lending or stock lending platforms. It had to do with daughters' weddings and college educations and college applications, but because it happened between two different custodians and the plaintiffs had said they wanted to receive those things, even if not relating to stock lending, we produced them.

So as far as we are aware, your Honor, there is nothing more to preserve and nothing more to produce. The SEC

order and the CFTC order relate to -- I don't have any inside information about what investigation led to those orders, and JPMorgan doesn't think it's appropriate to comment on the specific ins and outs of the negotiation of a consent order with the regulator, but I have gone to JPMorgan and I have asked them, as a result of anything that happened in the SEC or CFTC investigation, is the answer different now than it was at the time. At the time, based on the communications we had with covered custodians employed with the bank, we concluded there was nothing more to preserve or produce other than the one set of text messages we produced. I have asked, as to the custodians in this litigation, have you now come into possession of anything new that you didn't have then, and the answer is no, not to the best of our knowledge based on a reasonable inquiry, no.

THE COURT: All right. Sir, just pause right there, please.

When you've spoken with your client about whether you've come into possession of anything new, I appreciate that the answer is no, but I guess that for me begs the question, because if perchance these materials were discarded because they were on a personal device and the device either was, you know, traded up or changed or lost or something, that there might be nothing new and yet there might still be documents potentially responsive that were lost. Without disclosing

privileged communications, have you and your client accounted for the possibility that the custodians in this case, the covered custodians in this case, might have used personal devices on which the communications are now lost?

MR. WICK: We accounted for that in May 2019, your Honor. In May 2019, when the plaintiffs asked us what we were doing to preserve and produce these communications, we told them the three things we were doing. If they thought some fourth or fifth step was necessary, they should have said so then. They didn't say so. So based on the communications we had at the time, we concluded that as to the covered custodians discussed in our May 2019 email, there was nothing more to produce -- to preserve, there was nothing more to produce. If the question, your Honor, is, is there something about the SEC or CFTC order that leads me to believe that what we learned in May 2019 was wrong, the answer was no. The SEC order talks about a large number of JPMorgan employees. It says dozen. But the exemplars it gives of what was at issue there, it doesn't touch stock lending and it doesn't touch our time period. The time period in the SEC order is January 2018 to November of 2020. We are dealing with an earlier time period of 2008 through mid-2016, when AQS's assets were sold to EquiLend. So we think the best evidence of whether there was anything more to preserve or produce are the communications we had in May 2019. I have not -- I'm not privy to any sort of

inside information about what went on in the SEC and CFTC investigations, but it seems to us, your Honor, that the May 2019 communications we had with the plaintiffs and the communications that we had with the covered custodians at the time are the best evidence here.

THE COURT: Sir, if you'll pause please.

I wanted to make sure that I'm understanding what each side is saying. And so you'll recall that earlier in this discussion, when I was speaking with Mr. Eisenkraft, I was asking questions about whether the BYOD documents were something different from personal devices, and he gave his belief that the BYOD devices were a subset of the personal devices that were used by JPMorgan employees. I believe I understand you to be saying—but I want to make sure that I understand you to be saying—that when you negotiated the discovery protocols in May of 2019 as to the covered custodians, you obtained from them the responsive documents from, or responsive communications from, and you told them to hold, or put a litigation hold on communications that were on both their company-subsidized devices and their personal devices; am I correct?

MR. WICK: Correct, your Honor. And not wanting to waive any privileges, there is a sort of a -- there are two different communications or agreements at issue here. There's a July 2019 what I would call comprehensive and integrated

phone discovery agreement. And in that July 2019 agreement, there is implicitly a sort of a three-part taxonomy. There are employer-issued mobile devices, there are employer-subsidized or BYOD devices, and then there's a third category, which would be a purely personal device which is not employer subsidized and not employer issued, and that July 2019 phone agreement required the defendants to make certain productions as to the first two categories, employer-issued or employer-sponsored phones. It also imposed obligations as to work landline phone numbers. It did not impose any obligations to produce or preserve purely personal phone communications because the defendants objected that purely personal devices were beyond their custody and control, and the plaintiffs, while not necessarily agreeing with that, acquiesced in that in order to get what they wanted to get regarding BYOD and employer-issued devices. Notwithstanding that limitation, your Honor, notwithstanding that we had no obligation to do so, under the integrated and exhaustive and exclusive agreement relating to production of mobile phone discovery, we, pursuant to the May 2019 email exchange with the plaintiffs, did more than we were required to do. When we went to the covered custodians identified in the May 2019 email and asked them about their personal device communications, we asked them not just about employer-issued or BYOD communications but about also about communications on personal devices: Did you have any

communications on a personal device relating to stock lending or the litigation? Did you have any communications on a personal device with another custodian at another bank? And as I said, your Honor, the answer to that, the take-away from all those communications, without waiving any privileges, is, there was nothing, with one exception. The one exception was that string of about 50 text messages. That was from a purely personal phone. That was not from a work-issued phone. That was not from a BYOD phone.

THE COURT: Okay. Thank you.

And again, sir, you'll excuse me if you have said this to me. I just want to make sure I'm understanding this. I appreciate what you're saying, which is that you went beyond the commitments you had originally made, but when you speak about going to these covered custodians and asking them about communications on their personal devices, had you previously advised them or had the company advised them of the need for a litigation hold as to their personal devices? I'm distinguishing that from whatever you agreed to actually look at and produce with plaintiff's counsel, but you're saying, from the outset of this litigation, you had advised the covered custodians to retain all communications on whatever type of device they might rest?

MR. WICK: Correct, your Honor. And again, without wanting to waive any privilege, when the litigation was filed,

a hold notice went out promptly to all individuals who were identified as having potentially responsive ESI. That hold notice explicitly said, hold this stuff, no matter where it resides, even if it's on a personal computer or on a personal device. It explicitly addressed personal devices. That was the hold notice at the outset. Plaintiffs then raised, in May 2019, in a global email to all defendants, would you please reassure us that appropriate steps are being taken to preserve personal devices, and a week later we answered yes. As to personal devices, we did send a correct hold notice, but per your email, we will go back to them and specifically remind the covered custodians identified in the May 2019 agreement that they need to preserve purely personal device communications, not just work-issued device communications. And then we had the communications with custodians that I've described, and the upshot of that is, we ultimately came up with one text string from a personal device that we produced.

THE COURT: Okay. Now when you and I first began speaking, sir, you were giving me your response to some of the statements made by plaintiff's counsel in my discussions with plaintiff's counsel, and one of the things that you said was that you went back to your client, to JPMorgan, and asked them, as a result of the SEC and CFTC orders, is the answer different? If the answer that was given -- or I may have shorthanded that, but basically is there anything else for you

to do, is there anything that needs to be modified in light of the CFTC and SEC orders, and what you've told me today is that their response to you is no. Do I understand you to be saying, sir, that you haven't gone back and checked whether these particular custodians were involved in these particular matters, what you're saying is that way back when at the beginning of this litigation, your litigation hold covered their personal devices, you checked with them, and you've gotten all the responsive communications from personal devices, work devices, things of that nature. So do I have the recitation of facts correct so far, sir?

MR. WICK: No, your Honor.

THE COURT: Okay. Excuse me. So let me get it correctly, please.

MR. WICK: Yeah. We did what we did. When the plaintiffs raised this in May 2019, we did what we did, and our view is that if they thought something more was required by way of preservation, the time to say so was then, and nothing was said. Then after --

THE COURT: Okay. Yes.

MR. WICK: Then after, you know, two and a half years passes, the plaintiffs write us a letter December 23rd and then we have meet-and-confer communications with them, and at first those communications were focused heavily on what appeared to us to be searching for evidence of spoliation and to see if

they had some angle to bring a spoliation sanctions motion. When we eventually did have one videoconference with them, which was rather brief, Mr. Eisenkraft said something like, look, it looks like you went back and you might have got some more things off personal devices that you didn't have before and you now have something now that you didn't have then, and that seemed to me to be, you know, a reasonable question. I don't think the spoliation thing is reasonable at all, but he's saying, look, if you come into possession of something, some new evidence now that you didn't have then, I thought I should go ask my client whether there was anything like that. And so we've asked for the specific set of custodians, covered custodians at issue here: Do you now have any more personal device ESI or communications now than you had then? And the answer was no. In the *Interest Rate Swaps* case, the answer was yes, as to one individual, and we've told the plaintiff, as to one individual, we did after the close of discovery get something new in the *Interest Rate Swaps* case, and we've offered to meet and confer with them about whether they're entitled to get that. But the answer as to this case, as to these custodians, was no.

THE COURT: Okay. Thank you.

Sir, are there other things that you wish to comment on regarding my discussions with Mr. Eisenkraft or other things that you think would be useful to me in resolving this issue?

MR. WICK: I think beyond what we've discussed, your Honor, I would just rely on our papers on the fact that these issues were vetted and discussed in May 2019. If they think something more by way of preservation should have been done, they should have said so then, not long after the fact.

And finally, I would say that the idea that they would have negotiated a different phone discovery agreement I don't think is credible, your Honor. That phone agreement that they negotiated in July 2019 was not a one-off agreement with JPMorgan alone based on, you know, their impressions of what happened at JPMorgan. It was a global agreement between all plaintiffs and all defendants in which each side balanced their effective interest and we came out with a compromise, and the compromise was that they were entitled to get certain discovery, they were not entitled to get certain other discovery. That's clear from paragraph 18 of the discovery. And as I think I've heard Mr. Eisenkraft say, he's not saying anybody violated that agreement. Well, that was an integrated and exhaustive agreement, and they got everything they were entitled to get under it.

THE COURT: I thought I understood him to be saying in part that if only he had known about the degree to which individuals at JPMorgan used personal devices, he would have done something else. And so for you to say the time for them to do that was in 2019, I think that's his response. His

response is, I didn't know the degree to which business was conducted on personal devices. I'm understanding you, Mr. Wick, to be saying that the response to that is that it actually doesn't matter in this case because the parties agreed on a set of covered custodians; as to those covered custodians, the litigation hold pertained to personal devices. When it came time to get information from the covered custodians, you went and asked about materials on the personal devices, additional to the work and the BYOD materials, and so therefore, you think that the disclosures in the CFTC and SEC orders don't impact the quantum of discovery that would have been realized in this case; am I correct?

MR. WICK: Well, you cut out for about 10 seconds there, but I think I --

THE COURT: Oh, that's unfortunate. It was pretty brilliant stuff, too, sir, so I'm sorry that it did. But go ahead, yes. I can try it again, or I'll just listen to you.

MR. WICK: I think I have it. You're saying, as I understood it: Mr. Wick, isn't your primary argument that the SEC order or whatever it says about things in general doesn't tell us much of anything about these specific custodians; for these specific custodians, you addressed the problem, and there's no reason to think you didn't address it satisfactorily? You're right. That is our primary argument.

I also have a secondary argument, which is the

suggestion that the negotiation -- the agreement would have been negotiated differently I don't believe is credible because it wasn't a one-off agreement with JPMorgan alone; it was a collective agreement among all plaintiffs and all defendants. It was a global agreement. And so the perception that one defendant may have used a little more or a little less personal device communication I don't think would have changed the contours of a global agreement struck between all plaintiffs and all defendants.

THE COURT: Mr. Wick, let me ask a very different question, and that is: According to plaintiffs, the interrogatories are just designed to give them comfort, to make sure they understand and can have confidence in the completeness of what is being produced. I suspect I know the answer to this, but I want you to tell me: What would be so bad or so onerous about responding to any of the interrogatories? Perhaps you'll tell me all of it is just too much. But are you talking about each one of them would be too onerous a thing to do? And you may just say, look, Failla, I'm standing on principle, they should have done this years ago. But I'm asking a different question, which is: How tough would it be for you to respond to the three interrogatories I've been shown?

MR. WICK: Okay. I would sort of say the following, your Honor. I mean, shall I go interrogatory by interrogatory

or would you rather I sort of take it more generally?

THE COURT: Whatever's easier for you, sir. I'll take either.

MR. WICK: Okay. I'm just flipping to the interrogatories.

So in the first place, your Honor, we don't view these interrogatories as primarily designed to just learning whether there's any new information that they might be able to come into possession of. We view them as basically a fishing expedition to see if there's some sort of spoliation sanction motion that they can apply against JPMorgan, and we think that would be obviously unreasonable. So I would say three things.

First, discovery is closed. We spent millions of dollars, thousands of hours responding to discovery in this case. They need to show good cause. They shouldn't say, like, what's the harm in responding to the interrogatories. The burden is the other way. The burden is on them to show good cause to reopen discovery, and I don't think they have on this record.

Secondly, we think this is a fishing expedition to mount a spoliation sanctions motion. When they were specifically told what was being done to preserve this material and didn't suggest at the time that anything more was required, it seems to us already clear that a spoliation sanctions motion can't have merit, and therefore there's no reason to go down

that road and start putting burdens on us.

Third, the interrogatories are clearly and obviously overbroad, your Honor. They don't even limit themselves to the covered phone custodians that the parties agreed upon. They don't divide between employees who still work at the bank when the litigation was filed and an employee who in one case left the bank seven years before the litigation was filed. They don't draw any of those distinctions. They actually ask, or they demand a response as to anyone, whether or not they were even a document custodian, if they were identified on the initial disclosure to any party, any plaintiff or any defendant in the litigation. So, you know, as a matter of burden, proportionality, scope, they seem to us overbroad.

The first interrogatory: What was the basis for the representations you made? I mean, we're kind of dumbfounded by that one, your Honor. I mean, the representation that we made was that producing landline phone logs, not personal device phone logs, we made a representation that -- or an objection, really, not a representation, an objection that producing landline phone logs would be burdensome. Do they really seriously need to ask, in Interrogatory 1, What was the basis for your burden objection? That seems to us like harassment, not like good-faith discovery.

Interrogatory 2: What were the circumstances of your failure to preserve? Well, that's a legal conclusion. We

don't think there was any failure to preserve. So how do we answer "What was your failure to preserve" when, for the reasons I've articulated, we don't think there was any failure to preserve?

No. 3: "Identify all efforts JPMorgan undertook to investigate whether relevant employees" etc., etc., etc., I mean, that calls for privileged and work product information. When I had a meet-and-confer with Mr. Eisenkraft and asked him whether he was willing to narrow the interrogatories at all in any respect whatsoever, he said no. And that's the last exhibit, or that's among the exhibits in the two motions, to the two letters.

THE COURT: Okay. All right. Thank you, sir.

Mr. Eisenkraft, I'll hear from you in reply.

MR. EISENKRAFT: First of all, there are some corrections that I need to make. They're with Mr. Wick, actually.

THE COURT: Okay.

MR. EISENKRAFT: So he said that the SEC order just covered from 2018 or '19. What he did not say was that the CFTC order, in that order, JPMorgan consents to the fact that the issues were widespread since at least July 2015.

THE COURT: Yes. I did read that, sir.

MR. EISENKRAFT: Also, the discovery in this case is not 2009-2016; it's 2008 to the end of 2017. I triple-checked.

I don't know where -- he must have made -- just an error, but I just wanted to correct that.

And this is also a continuing conspiracy where the allegations go on, so they have a continuing obligation to preserve their documents. So the idea that this is somehow all in the past is just -- I disagree with that.

The idea that this is a global deal with all the defendants, if I had known, if I had the CFTC and SEC orders in front of me when I was negotiating these phone agreements, yes, the deal with JPMorgan would have been very different than the deal with everyone else.

And we're not fishing here for spoliation. We're trying to figure out if our documents were destroyed. So if they were destroyed, then we may have a spoliation motion, but if they were not, we're trying to figure out the harm that did or did not happen to us so we can decide what to do. We're not fishing. We have a $200 million, you know, consent decree from two regulators talking about this. This is not some sort of meritless thing.

And also, Mr. Wick was very careful, when he said who they had checked with, he said the custodians at issue here. They have defined that to exclude all former employees, which are a lot of them now. So I'm talking about all the custodians that we agreed to in this case and whose documents were produced. I think there are 18 of them. So, you know, I

didn't hear anything about checking with them, and this is the first I've heard of him checking with them, and what I want to know is just simply: JPMorgan did a huge investigation to figure out who was doing this kind of stuff. Were any of our 18 people doing this? That's what I would like to know.

THE COURT: Okay. One moment, please, sir.

All right. Mr. Eisenkraft, anything else?

MR. EISENKRAFT: No, your Honor.

THE COURT: Okay. I thank you both. Very, very well argued. I will think about this, and I'll issue an endorsement as quickly as I can. Thank you, all. Be well, everyone. We are adjourned.

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